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No. 04-631

In The
Supreme Court of the United States

STEPHEN RICHARDS,
in his official capacity as Secretary,
Kansas Department of Revenue,
Petitioner,

v.

PRAIRIE BAND POTAWATOMI NATION,
Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

BRIEF *AMICUS CURIAE* OF MULTISTATE TAX COMMISSION IN SUPPORT OF PETITIONER

FRANK D. KATZ, General Counsel
(*Counsel of Record*)
MULTISTATE TAX COMMISSION
444 No. Capitol Street, N.W. #425
Washington, D.C. 20001
(202) 624-8699

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BRIEF *AMICUS CURIAE* OF MULTISTATE TAX COMMISSION IN SUPPORT OF PETITIONER[1]

INTEREST OF *AMICUS CURIAE*

The Multistate Tax Commission is the administrative agency of the MULTISTATE TAX COMPACT. *See* RIA ALL STATES TAX GUIDE ¶ 701 *et seq.*, p. 657 (2001). Twenty-one States have legislatively established full membership in the COMPACT. In addition, five States are sovereignty members, eighteen States are associate members and three states are project members.[2] This Court upheld the validity of the COMPACT in *United States Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452 (1978).

Historically, the COMPACT evolved out of concern of the States and multistate taxpayers about proposed federal legislation to regulate state tax sys-

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[1] No counsel for any party authored this brief in whole or in part. Only *Amicus* Multistate Tax Commission and its member States through the payment of their membership fees made any monetary contribution to the preparation or submission of this brief. This brief is filed by the Commission, not on behalf of any particular member State. Finally, this brief is filed pursuant to the consent of the parties.

[2] The COMPACT parties are Alabama, Alaska, Arkansas, California, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Maine, Michigan, Minnesota, Missouri, Montana, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah and Washington. The Sovereignty members are Florida, Kentucky, Louisiana, New Jersey and Wyoming. The Associate members are Arizona, Connecticut, Georgia, Illinois, Maryland, Massachusetts, Mississippi, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Vermont, West Virginia and Wisconsin. Project members are Iowa, Nebraska and Rhode Island.

tems that followed recommendations of the Willis Committee.[3] The States' initial interest in forming the COMPACT was to safeguard state taxing authority—an essential governmental power for States to fulfill their constitutional role—from federal encroachment.

Preserving state taxing sovereignty under our vibrant federalism remains a key purpose of the Commission today. When States seek to tax transactions on Indian lands, tribes are a third concentric sovereign whose interests must properly be considered. Sorting out which sovereign has authority to impose tax on what transactions inevitably requires line drawing. The brighter the lines, the more administrable the tax, the fewer the conflicts and the lower the compliance burden on taxpayers and tax agencies.

The territorial component of sovereignty has been a key factor in forging bright-line rules. For over 170 years, the Court has imposed a bright-line standard that States have no jurisdiction over Indians on their sovereign lands unless Congress expressly authorizes it.[4] With regard to off-reservation transactions, the Court has likewise relied on a clear demarcation—that tribal sovereignty ends at

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[3] The Willis Committee, a congressional study of state taxation of interstate commerce sanctioned by TITLE II of PUB. L. 86-272, 73 STAT. 555, 556 (1959), made extensive recommendations as to how Congress could regulate state taxation of interstate and foreign commerce.

[4] *E.g. McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 168-69 (1973); *The Kansas Indians*, 72 U.S. (5 Wall.) 737, 757 (1866); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832).

the reservation boundary. "Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the State." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-149 (1973).

State attempts to tax non-Indians for transactions with Indians on tribal reservations raise more difficult issues. The non-Indian taxpayer is within the State and under state authority. Yet the transactions are with Indians on tribal lands, and therefore implicate tribal sovereignty. With sensitivity to both sovereigns, the Court, employing a unique implied-preemption standard, has developed a complex and nuanced balancing test to determine whether States may impose tax in these cases. The test calls for a "particularized inquiry into the nature of the state, federal, and tribal interests at stake . . . ." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980).

In the instant case, Kansas sought to impose fuel tax on non-Indian distributors for receiving gasoline off the reservation. The bright-line rule from *Mescalero Apache Tribe* should have controlled. The Tenth Circuit's erroneous use of the uncertain balancing test of *White Mountain Apache* clouds this bright line and impacts the Commission's interest in protecting state sovereignty in two ways.

First, the Tenth Circuit's holding jeopardizes the unambiguous rule that delineate state authority to tax based on the reservation boundary. Bright-line rules allow good relations to flourish between States and tribes and pretermit disputes and litigation between them.

Second, the holding jeopardizes state authority to tax off-reservation transactions. States depend upon tax revenues to run their governments. Subjecting off-reservation transactions that may subsequently impact Indian tribes to the inexact balancing test will substantially impair States' ability to impose taxes. The decision below deprived Kansas of tax revenue it rightfully expected from a tax imposed on a non-Indian distributor receiving fuel off the reservation merely because the gasoline was later sold to a tribal retailer.

ARGUMENT

I

THIS COURT HAS UNIFORMLY AND EXPRESSLY LIMITED THE SPECIAL INDIAN IMPLIED-PREEMPTION, BALANCING TEST TO RESERVATION ACTIVITIES

A. Cases developing the preemption-by-implication analysis rest on historical notions of tribal sovereignty and thus limit the doctrine to reservation activity.

The crucial necessity for taxing authority for States to fulfill their role as sovereign governments in our federal system has led this Court to sanction preemption of such authority only where Congress expressly so mandates. *Mescalero Apache Tribe v. Jones*, 411 U.S. at 148-49; *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598, 606 (1943); *United States Trust Co. v. Helvering*, 307 U.S. 57, 60 (1938); *Trotter v. Tennessee*, 290 U.S. 354, 356 (1933).

In one special area, however, where States seek to tax activity on tribal reservations and considera-

tions of tribal sovereignty are presented, the Court began development of a doctrine permitting preemption *by implication* in *Warren Trading Post Co. v. Arizona Tax Commission*, 380 U.S. 685 (1965). The Court held that the federal Indian trader statutes, 25 U.S.C. § 261-262, regulated all aspects of sales of goods to Indians on reservations and therefore preempted *by implication* a state tax imposed on the traders receipts from reservation sales to Indians. Each subsequent case developing the Indian preemption-by-implication analysis made clear that the conceptual basis for this unique exception to express preemption of state tax is inextricably tied to notions of tribal sovereignty on Indian reservations.

In 1973 with *McClanahan v. Arizona Tax Commission*, 411 U.S. 164 (1973) and *Mescalero Apache Tribe v. Jones*, the Court first fully articulated the central theoretical basis for the doctrine and the concomitant restriction of its applicability to on-reservation activity. *McClanahan* concerned the imposition of Arizona income tax on reservation income of a Navajo Indian working and residing on the reservation. The Court noted that neither Indian sovereignty nor the federal instrumentality doctrine—previously used by the Court to strike down state regulation or taxation on Indian reservations—blocked the imposition of state tax on the reservation. The modern trend, the Court announced, was toward reliance on federal preemption.

> Finally, the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption. [Citation omitted.] The modern cases thus tend to

> avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power. [Citations omitted.]
>
> The *Indian sovereignty doctrine* is relevant, then, not because it provides a definitive resolution of the issues in this suit, but because it *provides a backdrop against which the applicable treaties and federal statutes must be read.*

McClanahan, 411 U.S. at 172. (Emphasis added.)

The effect of using Indian sovereignty as "a backdrop" against which federal law must be read was to import into the preemption analysis a special rule of interpretation applied to Indian treaties. The rule requires that

> "[d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are the wards of the nation, dependent upon its protection and good faith."

Id. at 174 (quoting *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930)). Using this canon of construction, then, the Court found an exemption from Arizona tax *by implication*, relying on federal policy implicit in congressional enactments: "Congress has consistently acted on the assumption that states lacked jurisdiction over Navajos living on the reservation." *McClanahan*, 411 U.S. at 175. This tax exemption by implication, the key feature of this unique Indian preemption standard, derives directly from the effect of tribal sovereignty on the preemption inquiry. Tribal sovereignty is limited to Indian lands.

In the companion case of *Mescalero Apache Tribe v. Jones* concerning off-reservation tribal activity the Court limned the outer limit of the implied-preemption analysis. The Court held that the New Mexico gross receipts tax imposed on receipts of a tribal-operated ski area located *off the reservation* was not preempted in the absence of an explicit federal tax exemption. The Court first cited *McClanahan* for the standard to be applied to "activities carried on within the boundaries of the reservation" and went on to distinguish the preemption standard for state taxation of activities occurring off reservation:

> *Absent express federal law to the contrary*, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the state.

Mescalero Apache Tribe v. Jones, 411 U.S. at 148-149. (Emphasis added.) In support of the requirement that off reservation Congress must be explicit in providing a tax exemption, the Court quoted *Oklahoma Tax Commission v. United States:*

> "This Court has repeatedly said that tax exemptions are not granted by implication. . . . It has applied that rule to taxing acts affecting Indians as to all others. . . ."

Mescalero Apache Tribe v. Jones, 411 U.S. at 156. Unless Congress expressly forbade it, New Mexico retained the power to tax "Indian activities located or occurring 'outside of an Indian reservation.'" *Id.*, at 149-150. This Court has thus made absolutely clear that in situations involving off-reservation ac-

tivities only an actual conflict with express federal law will preempt the imposition of a state tax, even when the state tax is imposed on Indians.

The Kansas fuel tax at issue in this case was not imposed on the tribe, a tribal entity or tribal member and it was not imposed on a reservation activity. Rather the tax was imposed on a non-Indian distributor when it received fuel in Troy, Kansas, some 60 miles away from the reservation. Thus, the Tribe's claim that courts can imply an exemption from this fuels tax is directly contrary to controlling precedent in *Mescalero Apache Tribe v. Jones*.

In *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), the Court further expanded on the nature and basis of the special implied-preemption analysis in striking down Arizona's imposition of tax on non-Indian logging companies doing business exclusively on the Fort Apache Indian Reservation. The Court emphasized that the preemption law is different when, and because, tribal sovereignty considerations are implicated.

> The unique historical origins of tribal sovereignty make it generally unhelpful to apply to federal enactments regulating Indian tribes those standards of preemption that have emerged in other areas of the law. Tribal reservations are not states, and the differences in form and nature of their sovereignty make it treacherous to import to one notions of preemption that are properly applied to the other.

White Mountain Apache, 448 U.S. at 143. The Court characterized the implied-preemption analysis as a

balancing test with its "particularized inquiry into the nature of the state, federal, and tribal interests at stake . . . ." *Id.* at 145. Significantly, the Court in *White Mountain Apache* reaffirmed the *Mescalero Apache Tribe v. Jones* holding that *off the reservation* an express congressional statement of tax exemption is required:

> In the case of "Indians going beyond reservation boundaries . . . however . . . a nondiscriminatory state law" is generally applicable in the absence of "express federal law to the contrary." *Mescalero Apache Tribe v. Jones, supra*, at 148-149, 92 S.Ct. at 1270.

White Mountain Apache, 448 U.S. at 144, fn. 11.

In a companion case, the Court struck down the Arizona transaction privilege tax when applied to a sale made to an Indian on an Indian reservation. *Central Machinery Co. v. Arizona State Tax Commission*, 448 U.S. 160 (1980). The Court held that "since the transaction in the present case is governed by the Indian trader statutes, federal law preempts the asserted state tax," *id.* at 165. There is no question that the taxed activity occurred on the reservation as "these [Indian trader] statutes and regulations apply only to activities on reservations." *Warren Trading Post*, 380 U.S. at 690, fn. 14.

The next case to apply the doctrine, *Ramah Navajo School Board, Inc. v. Bureau of Revenue*, 458 U.S. 832 (1982), struck down the imposition of New Mexico gross receipts tax on receipts of a non-Indian contractor from building a school on the reservation. The Court in *Ramah* relied upon and cited

extensively from *White Mountain Apache*, re-emphasizing the uniqueness of this preemption standard and the central importance of tribal sovereignty.[5]

In each ruling applying this unique standard, the Court found an implication in a statutory scheme that Congress had intended to preempt the state tax on that particular reservation activity. The reservation locus of the taxed transactions in these cases was not fortuitous. Rather, it was central to the underlying conceptual difference between the implied preemption standard applied on reservations and the express preemption standard employed by the Court elsewhere. The very source of the on-reservation standard was the addition of "traditional notions of tribal sovereignty" to the inquiry which represents an additional sovereignty interest to be weighed with state and federal interest.

B. Every other case applying the special implied-preemption test has likewise concerned on-reservation activity.

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[5] The *Ramah* Court held that tribal sovereignty and congressional support thereof "inform the preemption analysis."

> The question whether federal law, which reflects the federal and tribal interests, preempts the State's exercise of its regulatory authority is not controlled by standards of preemption developed in other areas. [Citation omitted.] Instead, *the traditional notions of tribal sovereignty, and the recognition and encouragement of this sovereignty in congressional Acts promoting tribal independence and economic development, inform the pre-emption analysis* that governs this inquiry.

Ramah, 458 U.S. at 838. (Emphasis added.)

In all other cases where the Court has used the special implied-preemption, balancing-of-interests test it was always determining States authority over an *on-reservation* activity. The Court authorized States to require tribes to collect and remit state cigarette taxes imposed on non-Indians for on-reservation cigarette purchases in *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Tribe of Okla.*, 498 U.S. 505 (1991), *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134 (1980), and *Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation*, 425 U.S. 463, 483 (1976). It authorized States to require Indian traders selling cigarettes on-reservation to tribal retailers to pre-collect the cigarette tax imposed on the non-Indian customers buying from reservation stores in *Department of Taxation and Finance of New York v. Milhelm Attea & Bros.*, 512 U.S. 61, 74 (1994). It authorized States to impose severance tax on non-Indians severing oil and gas from reservation lands in *Cotton Petroleum Co. v New Mexico*, 490 U.S. 163 (1989). It barred California from regulating on-reservation tribal gambling offered primarily to non-Indians in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202 (1987). And it prohibited New Mexico from regulating on-reservation hunting and fishing by non-Indians in conflict with tribal regulations in *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324 (1983). In each case, the activity the State sought to tax or regulate occurred on the reservation, justify the invocation of the balancing test, the hallmark of the implied-preemption analysis.

In the only case in which the Court was asked to apply the fully-developed implied-preemption analysis to a state tax imposed on an off-reservation ac-

tivity, it dismissed the appeal for want of a substantial question. *Rodey, Dickason, Sloan, Akin & Robb, P.A. v. Revenue Division*, 759 P.2d 186, 187 (NM 1988) ("The federal preemption by implication doctrine created by the United States Supreme Court to protect Indian interests on the reservation does not apply to activities of non-Indians occurring off Indian reservations."), *appeal dismissed*, 490 U.S 1043 (1989). Dismissal of an appeal constitutes controlling authority. *Hicks v. Miranda*, 422 U.S. 332, 344 (1975) ("[v]otes to affirm summarily, and to dismiss for want of a substantial federal question, it hardly needs comment, are votes on the merits of a case . . . .")

State tax imposed on an off-reservation activity will not be preempted absent an express provision of federal statute. *Mescalero Apache Tribe v. Jones* and *Rodey* remain the controlling authorities today. The Tenth Circuit erroneously invoked the special Indian preemption-by-implication analysis in testing the validity of the Kansas fuel tax imposed on the distributor's receipt of gasoline off-reservation.

II

THE COURT HAS EMBRACED A BRIGHT-LINE "LEGAL INCIDENCE" TEST TO DETERMINE ON WHICH PARTY AND WHAT TRANSACTION A STATE IMPOSES TAX.

Prior to selecting the legal standard to test the validity of a State's tax, one must first determine on whom and on what transaction the tax is imposed. With due respect to state sovereignty and administrative predictability, the Court has ruled that this preliminary issue is resolved by the bright line of

where the state has prescribed the legal incidence of tax. *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995) ("The initial and frequently dispositive question in Indian tax cases, therefore, is who bears the legal incidence of a tax.") Whether that person may be taxed for that transaction will then be decided by this Court's settled law with regard to the authority of the respective sovereigns to impose tax. Because the legal incidence of tax in *Chickasaw* was found to be on the reservation sale of gasoline by the tribal retailer, the Court held absent express permission from Congress it was invalid. *Id.*, at 451 ("when Congress does not instruct otherwise, a State's excise tax is unenforceable if its legal incidence falls on a Tribe or its members for sales made within Indian country.")

In an attempt to avoid that result, Oklahoma had urged the Court to ignore the legal incidence test and rely instead on the "economic realities" that the ultimate economic burden of the tax was borne by the non-Indian customers, a theory that would then allow use of the balancing test to validate the tax under the holding of *Colville* that States may impose the minimal burden of collection on tribes. The Court rejected that proposal with the comment that

> our focus on a tax's legal incidence accommodates the reality that tax administration requires predictability. The factors that would enter into an inquiry of the kind the State urges are daunting.

Id. at 459-60. The Court explained the rationale for preferring the legal incidence test over the proffered "economic realities" test.

> By contrast, a "legal incidence" test, as 11 States with large Indian populations have informed us, "provide[s] a reasonably bright-line standard which, from a tax administration perspective, responds to the need for substantial certainty as to the permissible scope of state taxation authority."

Id. at 460. Finally, the Court bluntly acknowledged that this legal incidence test allows a State to control, in considerable measure, the enforceability of its tax by choosing to place the legal incidence on a party and on a transaction for which settled law sets no bar.

> And if a State is unable to enforce a tax because the legal incidence of the impost is on Indians or Indian tribes, the State generally is free to amend its law to shift the tax's legal incidence. So, in this case, the State recognizes and the Tribe agrees that Oklahoma could accomplish what it here seeks "by declaring the tax to fall on the consumer and directing the Tribe to collect and remit the levy." *Id.*

Kansas has chosen to place the legal incidence of its fuels tax "on the distributor of the first receipt of the motor fuel." Kan. Stat. Ann. § 79-3408(c). Fuel is "received" at a refinery or pipeline terminal when it is loaded into the tank truck of a distributor. Kan. Stat. Ann. § 79-3401(p). The Tenth Circuit affirmed this interpretation of Kansas law. "The Kansas legislature structured the tax so that its legal incidence is placed on non-Indian distributors." *Prairie Band Potawatomi Nation v. Richards*, 379 F.3d 979, 982

(10th Cir 2004). Thus, applying the legal incidence test of *Chickasaw* to the settled law of *Mescalero Apache Tribe v. Jones* requiring express federal preemption off the reservation would appear to compel affirmance of the Kansas fuel tax on the distributor's receipt of gasoline off reservation.

How, then, did the Tenth Circuit reach a different result? Its logical slip can be isolated in a single sentence where it confounds the issue in *Chickasaw*—whether tax was imposed on the tribal retailer or its non-Indian customer for the same reservation transaction—with the circumstance here—whether tax was imposed on an Indian *for a reservation transaction* or on a non-Indian *for an off-reservation transaction*. First it acknowledged primacy of the legal incidence test. Then it drew the distinction between a tax imposed on the tribal retailer in *Chickasaw* and a tax imposed on the non-Indian here, with the following language.

> "If the legal incidence of an excise tax rests on a tribe or on tribal members for sales made inside Indian country, the tax cannot be enforced absent clear congressional authorization." *Id.* at 459. However, where, as here, "the legal incidence of the tax rests on non-Indians, no categorical bar prevents enforcement of the tax; if the balance of federal, state, and tribal interests favors the State, and federal law is not to the contrary, the State may impose its levy . . . ." *Id.*

Powataomi, 379 F.3d at 983. The Tenth Circuit recognized the Indian/non-Indian distinction by acknowledging the legal incidence here rests on the

non-Indian distributor, not the tribe, so congressional authorization was not required. But by referencing the balancing-of-interests, implied-preemption test applicable in *Chickasaw* where the tax was imposed for a reservation transaction on either the tribal retailer or its customer, it ignored the on-reservation/off-reservation distinction. The balancing test is not applicable here, however, where the non-Indian distributor is not being taxed on a reservation transaction but on its receipt of gasoline *off reservation* at the refinery in Troy, Kansas. Ignoring this crucial distinction led the Tenth Circuit erroneously to apply the implied-preemption analysis of *White Mountain Apache* rather than the express preemption requirement of *Mescalero Apache Tribe v. Jones*.

CONCLUSION

Two bright-line rules control this case. The bright line rule of *Chickasaw* determines the enforceability of a tax based upon where the State has chosen to place its legal incidence. The bright-line rule of *Mescalero Apache Tribe v. Jones* holds that with regard to tax imposed on an off-reservation transaction any congressional preemption must be express, not implicit. There is neither factual nor legal dispute that the legal incidence of the tax here is on the distributor for the off-reservation receipt of the gasoline. Nor is there any suggestion that an express provision of federal law bars Kansas from taxing. The decision of the Tenth Circuit must be reversed.

Respectfully submitted,

Frank D. Katz, General Counsel
Counsel of Record

MULTISTATE TAX COMMISSION
444 No. Capitol Street, N.W., #425
Washington, D.C. 20001
(202) 624-8699

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